FILED
DEC 23 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

against

THE RECTOR, CHURCH WARDENS and VESTRYMEN of the CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DE WOLFE as Bishop of the Diocese of Long Island,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1950

No.

John Howard Melish, William Howard Melish, Lewis Reynolds, Anna May Mason and all other persons similarly situated or whom the same may represent,

Petitioners,

against

The Rector, Church Wardens and Vestrymen of the Church of the Holy Trinity in the City of Brooklyn, a religious corporation; Leonard Hull Smith and Randall C. Walker, individually and as Wardens of said Church; Joseph Dana Allen, Haughton Bell, Bruce Bromley, Merrill N. Foote, Walsh W. Shelley, H. Edward Vollmers and Burton H. White, individually and as Vestrymen of said Church, and James Pernette de Wolfe as Bishop of the Diocese of Long Island,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners above-named pray that a writ of certiorari issue to review a decision of the Court of Appeals of the State of New York, the court of last resort of that state, rendered October 5, 1950, dismissing an appeal taken by petitioners to that Court from part of a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 6, 1950, affirming a judg-

ment of the Supreme Court in favor of respondents, entered in Kings County on April 26, 1960.

The part of the judgment as affirmed upon which review is sought in this Court enforces by declaratory and injunctive decree of the civil court, execution and compliance with the ecclesiastical judgment of respondent Bishop dissolving the pastoral relation between petitioner Archbishop Howard Melish as Rector and the Church of the Holy Trinity, Brooklyn, New York (R. 158-159).

Opinions Below

The Supreme Court of the State of New York rendered an opinion, which is reported in 194 Misc. 1000. The Appellate Division affirmed and denied reargument or leave to appeal, without opinion. 276 App. Div. 1099, 277 App. Div. 785. The Court of Appeals handed down a memorandum, which is reported in 301 N. Y. 679.

Question Presented

Whether the part of the judgment sought to be reviewed, by coercing execution and compliance with the ecclesiastical judgment of the Bishop on pain of contempt of court—in the teeth of an exclusive and different ecclesiastical remedy, namely, deprivation of diocesan representation until they submit thereto—constitutes an unwarranted intrusion of the civil power of the state in a religious controversy in violation of the constitutional separation of church and state guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment thereof?

Statement of Matter Involved

Issue

In March 1950, the respondents (there then the Bishop as plaintiffs) commenced an action in the Supreme Court of the State of New York, Kings County, against the petitioners and the Bishop as defendants (R. 83). The relief sought in that action was the civil court's judgment enforcing, by declaratory and injunctive decree, among other matters, execution and compliance with the ecclesiastical judgment of the Bishop, dissolving the pastoral relation between petitioner John Howard Melish as Rector and the Church of the Holy Trinity, Brooklyn, New York (R. 90-93). The Bishop, though nominally a defendant in that action, by a cross-pleading joined in the prayer for that relief (R. 114).

After trial, the Supreme Court granted judgment in favor of respondents. The text of the part of the judgment which petitioners seek to review, is as follows (R. 188-189):

"1. It is hereby declared:

* * *

(c) That the pastoral relation between the Church of the Holy Trinity in the City of Brooklyn and the defendant John Howard Melish ensued and determined on April 4, 1949 and the defendant John Howard Melish legally ensued to be the Rector of said Church on April 4, 1949, and since that date has not been, and is not now legally authorized to exercise any of the ecclesiastical or temporal rights and duties of said office.

2. The defendants other than the defendant James Pernette DeWolfe, individually and collectively and all persons whom they purport to represent and all others who may attempt to act in concert

with them are hereby permanently enjoined and restrained from:

(a) Interfering with, delaying or preventing the execution and full compliance with the judgment of the defendant James Pernette DeWolfe as Bishop of the Diocese of Long Island, that the pastoral relation between the defendant John Howard Melish and the Church of the Holy Trinity in the City of Brooklyn be dissolved on April 4, 1949.

3. The defendant John Howard Melish is hereby permanently enjoined and restrained from exercising control of the worship and the spiritual jurisdiction of the Church of the Holy Trinity in the City of Brooklyn, and from the use and control of the Church and Parish buildings with the appurtenances and furniture thereof."

The quoted text from the judgment follows the prayer of the complaint and the prayer of the cross-pleading interposed by the Bishop. In their answers, all petitioners pleaded as a defense the facts which form the basis of the question upon which review is sought (R. 68-69, 101-102). The defense is pleaded in substantially similar language; and that in the answer of Reynolds, etc., is, as follows: (R. 101-102):

> "31. Canon 27 of the Diocese of Long Island (See Paragraph 'Twentieth' hereof and Exhibit 1) provides the sole remedy for neglect or refusal on the part of the Congregation to comply with a judgment of the Bishop rendered thereunder and that such sole remedy is to deprive the Congregation of a representative to the diocesan convention until they submit.

44. The Congregation refuses to comply with the purported pulpitment of the defendant Bishop.

* * *

51. A civil Court, therefore, has no power to grant any other, further or different relief in the premises."

Parties

There has been a change in the alignment of the parties in this controversy since this action was commenced, in consequence of the two regular annual parish elections that intervened. The action was commenced by the church corporation and the former vestry as a body and nine former vestrymen as individuals against the rector, the assistant minister and the committee representing more than 70% of the congregation (R. 173-174, 301-302, 304).

On the second day of the trial, it was stipulated that at the regular annual meeting of the prior evening (April 18, 1949) a new vestry was elected and that the new vestry for itself and for the church corporation repudiated the action of the Bishop and took a position in support of the Rector (R. 476-477). The regular term of office of respondents Walker, Bromley, Vollmers and White as vestrymen had then expired and petitioner Reynolds was elected as church warden in place of respondent Walker and others favorable to the Rector were elected in place of the other three respondents (R. 444, 540; Defendant's Exh. R.). At the second regular annual meeting referred to, on April 10, 1950, the regular term of office of respondents Smith, Allen and Sellew as vestrymen had expired and they failed of reelection; again, others favorable to the Rector were elected to fill the vacancies (Brooklyn Daily Eagle, April 11, 1950; New York Times, April 11, 1950).

Thus, Holy Trinity Church as a corporation and its new vestry as a body and the Holy Trinity congregation

are all now in favor of the position of the Rector and the Assistant Minister and only a minority of two holdover vestrymen, aided by the Bishop, are opposed to it.

Background

The beloved rector of the Church of the Holy Trinity for 45 years was himself dismissed, because he refused to dismiss the assistant minister, who is his son (R. 28, 440). The controversy grew out of a difference of opinion between the rector and the former vestry concerning the so-called outside activities of the assistant minister (R. 28). These centered chiefly about the assistant minister's activities in the National Council of American-Soviet Friendship (R. 458-473), of which he was chairman until about a month before the trial (R. 459).

The National Council was incorporated under the laws of the State of New York as a result of a weekend meeting in 1943 of many people in different walks of life, including the Vice-President of the United States and other high officials of our government, who in the course of the war felt that better understanding would improve the alliance working for victory (R. 381). Ever since then, a number of important members of the Episcopal Church have been associated with the National Council and at the time of the trial an Episcopal Bishop was a member of its board of directors (R. 382).

The assistant minister's interest in that direction was awakened by his prior work in Russian War Relief, the Brooklyn Division of which was also served by Mr. Hunter L. Delatour, Col. Jackson A. Dykman and Edward A. Richards, all members of the standing committee of the Long Island Diocese of the Protestant Episcopal Church (R. 382-383). In the summer of 1946, Bishop DeWolfe of this Diocese telephoned the assistant minister and asked him to represent the Bishop at a meeting of Russian War Relief, which the assistant minister did (R. 383).

At every large public meeting of the National Council, an invitation was extended to some outstanding clergyman to give the invocation (R. 383). Bishop Ludlow of Newark gave the invocation at one public meeting (R. 383-384). The rector, at another (R. 384). As late as 1947, an invitation was extended to Bishop DeWolfe, respondent herein, to give the invocation at a large public meeting held for Russian War Relief (R. 384). The Bishop was unable to accept, but Assistant Bishop Larned accepted and gave that invocation (R. 384).

Then came a change in the official attitude. The National Council was put upon the Attorney General's list in November or December of 1947 and early in 1948 the assistant minister and others filed suit in the District of Columbia Federal Court to remove it from the list (R. 385-386, 391). Certiorari was granted at the October Term, 1949, No. 554, to review the action of the Attorney General and the case at this writing is pending in the United States Supreme Court (National Council of American-Soviet Friendship, et al., v. J. Howard McGrath, Attorney General, et al.). The reason why the assistant minister continued his work with the National Council was thus stated by him (R. 380):

> "Because I believe that world peace depends upon the relationship between our own country and the Soviet Union, at this point, and anything constructive which a Christian clergyman can do in that area I believe is his conscientious duty to attempt to do."

It was not disputed that, when the former vestry finally demanded that the rector dismiss the assistant minister, the rector spoke with every one of them, as follows (R. 465):

> "Do you believe in this man's integrity? Yes. Do you believe in his sincerity? Yes.

> Do you believe in his earnestness? Yes.
>
> Do you believe in his devotion to the cause of Christ? Yes.
>
> Now, what more do you want of a Minister than those things?"

Moreover, the Bishop admitted that there was no "doctrinal" question or question of "heresy" involved nor any question of "immorality" (R. 334) nor even a question of "conduct unbecoming a clergyman" (R. 334), and added (R. 334):

> "I have every confidence in the moral integrity of these men."

Nevertheless, based upon the rector's refusal to discharge the assistant minister, the nine former vestrymen filed a petition on January 21, 1949, with the Bishop, praying for a dismissal of the rector (R. 23-25).

Before the petition was filed with the Bishop and at a meeting of the vestry on January 17, 1949, the rector was asked to resign (R. 23). That same evening, 73 members of the congregation sent the following telegram to the Bishop (R. 173-174); Defendant's Exhibit F):

> "We are shocked at the action of the vestry in asking for the resignation of our beloved Rector and assure you that in so acting they in no wise represent the sentiment of Holy Trinity Parish. We have met on short notice to plan action to canvass the parish on this issue and shall do all in our power to negate the vestry's action. We beg of you to exert all your influence to avert the consequences before they adversely affect the welfare of our Parish, Diocese and Church. We have elected representatives to discuss the issue with you and request that you meet them without delay."

Still before the receipt of the petition by the Bishop, the telegram was followed by a telephone call from one of the signatory members of the congregation, asking the Bishop to give a committee of the congregation an audience (R. 352). The Bishop refused, as he stated it, "Simply because it was my judgment that it was no time to see him" (one of the Committee) (R. 353), although the Bishop admitted that he twice saw a committee of the vestry (R. 354).

Thus, although notified that the action of the vestry in no way represented the sentiment of Holy Trinity Parish and after refusing to give audience to a committee of the congregation, the Bishop later received the petition of January 21, 1949, and on January 24, 1949, referred it to the standing committee of the Diocese of Long Island for advice (R. 26). And the standing committee called a hearing for February 15, 1949, upon notice to the clerk of the vestry and to defendant Reynolds as chairman of the Committee to Retain Our Rector (R. 26).

The Bishop admitted, however, that before the standing committee held the scheduled hearing and upon its advice, he had asked the rector to resign (R. 306-307).

It was agreed that the hearing by the standing committee was held under Canon 27 of the Long Island Diocese (R. 356). The full text of this Canon is set forth below.

The rector's counsel produced evidence before the standing committee that over 70% of the duly qualified voting members of the parish (R. 304) signed statements reading, as follows (R. 176, 535; Defendant's Exhibit H, p. 123):

> "We, the undersigned members of Holy Trinity Parish, are completely opposed to the action of the Vestry in asking the resignation of our Rector, Dr. John Howard Melish.

> We have the utmost affection for Dr. Melish and approve the policy he consistently followed for the 45 years of his rectorship. We state that the Vestry in this action in no way represents our sentiments."

Refusal to accept episcopal judgment

Having been repulsed and disregarded by the Bishop, the congregation refuse to accept his judgment. It was conceded at the trial that the new vestry and more than 70% of the duly qualified voting members of the congregation refuse to accept the arbitral judgment of the Bishop, ousting the rector (R. 301, 302, 304, 476). The same is true of the rector also (R. 18).

The Canon Involved

The Canon to which the defenses refer is as follows (R. 71-73):

> "Canon 27
>
> Of the Dissolution of the
> Pastoral Relations
>
> *Rector not to resign without consent of Vestry or be removed against his will.*
>
> Section I. A Rector may not resign his Parish, without the consent of the said Parish, or its Vestry, or its Trustees, whichever may be authorized to act in the premises, nor may any Rector or Minister canonically or lawfully elected and in charge of any Parish be removed therefrom by said Parish, Vestry or Trustees, against his will, except as hereinafter provided.

Ecclesiastical Authority to approve support or payments.

Sec. II. If for any reason a Rector or Minister as aforesaid, or the Parish committed to his charge, or its Vestry or Trustees, shall desire a separation and dissolution of the pastoral relation the parties may agree respecting such separation and dissolution and the terms thereof, provided, however, that an agreement imposing upon such Parish or its Vestry or Trustees any obligation to support or contribute to the support of such Rector or Minister or to pay him any sum or sums of money shall not become effective unless and until the Ecclesiastical Authority, acting by and with the advice and consent of the Standing Committee, shall approve the terms and conditions thereof and such consent and approval shall have been indorsed on or annexed to such agreement and such agreement, with such consent and approval filed with the Secretary of the Standing Committee.

Mode of Settling Differences.

Sec. III. If for any urgent reason a Rector or Minister as aforesaid, or the Parish committed to his charge, its Vestry or Trustees, shall desire a separation and dissolution of the pastoral relation, and the parties be not agreed respecting such separation and dissolution, notice in writing may be given by either party to the Ecclesiastical Authority. The Bishop, in case the difference be not settled by his godly judgment, or if he decline to consider the case without counsel, may ask the advice and consent of the Standing Committee, and, proceeding with its aid and counsel, shall be the ultimate arbiter and judge. If there be no Bishop, the Ecclesiastical Authority shall select a Bishop of an adjacent Dio-

cese to act as the Bishop, and with like force and effect. The judgment shall be either that the pastoral relation between the parties shall cease and determine at a time and upon terms therein specified, or that the said relation shall not be terminated; and it shall be the duty of both parties to submit and abide by such judgment.

Dissolution of the relationship.

Sec. IV. (1) If the final judgment be a recommendation that the pastoral relation be dissolved and that titles be relinquished by the Clergyman and he shall refuse to comply with the same within 30 days after the decision has been made known to him, the Bishop may declare the canonical dissolution of all connection between the parties.

Penalty for failure to comply.

(2) *And if the Vestry or Congregation refuse or neglect to comply on their part with such decision or judgment, the Church or Congregation shall be prohibited from a representation in Diocesan Convention until they submit thereto.*

Dissolution to be recorded.

Sec. V. In case of the regular and canonical dissolution of the connection between a Rector or Minister and his Parish, under this Canon, the Ecclesiastical Authority shall direct the Secretary of Convention to record the same."

(Emphasis in (2) supplied.)

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257(3). The decision of the New York State Court of Appeals was rendered on October 5, 1950 (R. 591).

In the trial court, it has been seen, the facts which form the basis of the question upon which review is sought in this court were pleaded by petitioners as a defense (R. 68-69, 101-102). In its opinion, the trial court reviewed the Constitution and cases on the doctrine of the separation of church and state, but, nevertheless, concluded that respondents were entitled to the injunction sought.

Thus, the trial court quoted from *Watson* v. *Jones,* 80 U. S. at p. 730, the following (R. 496):

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

Then the court added its own observation on this subject, as follows (R. 496):

> "If ever we depart from this it will be a sorry day for America, for then the basic principle of the separation of church and state will be at an end.
>
> The founders of our Republic recognized this when into our Constitution they wrote those sixteen pregnant words: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. (U. S. Const., 1st Amendt.) This must forever remain one of the foundation stones of our Nation. When that stone crumbles, the Nation will crumble with it."

Yet, the trial court concluded, as follows (R. 499):

> "The plaintiffs had a perfect right to resort to a court of equity to restrain injury to themselves or to protect the property of the church, for this involved a civil right."

It will be shown under the discussion of the reasons for granting this petition, that, even to the incidental extent that church property was involved, the court was bound to heed the exclusive esslesiastical remedy, for church property must be administered by command of statute "in accordance with the discipline, rules and usages" of the church (New York Religious Corporation Law, Section 5).

In the brief of petitioners Reynolds and Mason on the appeal to the Appellate Division, under Point II, reading (R. 577):

> "The judgment of the Court below was unauthorized, because the Canons themselves provide the exclusive ecclesiastical remedy for their enforcement, namely, deprivation of Diocesan representation until the parties submit",

there appears the following (R. 577-578):

> "Since under the Canons, the sole and exclusive remedy for enforcement of the Bishop's arbitral judgment is a prohibition of representation in Diocesan Convention until 'they submit thereto', the Court below had no authority to grant the injunction appealed from coercing compliance on pain of imprisonment for contempt. For that not only ignores the contract made by the parties, but also constitutes the rankest sort of interference by a civil court with church affairs.
>
> By a strange anomaly, all this was done on the basis of a 'deep and sincere' conviction that consti-

> tutional restraint 'has secured religious liberty from the invasion of the civil authority' (fols. 1486-87). A grosser invasion of religious liberty is difficult to imagine."

Since the Appellate Division affirmed, without opinion, 276 App. Div. 1088, there is no way of telling upon what basis that court disposed of the defense.

Thereafter, petitioners Melish moved in the Appellate Division for reargument or leave to appeal to the Court of Appeals and petitioners Reynolds and Mason moved for leave to appeal. In their affidavit, petitioners Reynolds and Mason pointed out to that court (R. 578):

> "Finally, a decree of a civil Court, coercing compliance on pain of contempt with an arbitral judgment of a Bishop in the teeth of an exclusive and different ecclesiastical remedy, is unauthorized as in violation of the terms and intent of the freedom of religion guaranteed by the New York State and Federal Constitutions."

These motions, too, were denied without opinion (277 App. Div. 783).

Thereupon, petitioners appealed to the Court of Appeals and by their notice of appeal stated, in pertinent part, as follows (R. 550):

> "Please Take Further Notice that said defendants appeal from that part of said judgment as affirmed which, by declarative and injunctive relief, approves and enforces the arbitral judgment of defendant Bishop dissolving the pastoral relation between the Rector and the Church of the Holy Trinity.
>
> Please Take Further Notice that this appeal is taken as of right on the ground that there is directly involved the construction of the Constitution of the

> State of New York, Article I Section 3, and the Constitution of the United States, First and Fourteenth Amendments, in that, the part of the judgment appealed from, by coercing compliance with the arbitral judgment of the Bishop on pain of contempt of court in the teeth of an exclusive and different ecclesiastical remedy, namely, deprivation of diocesan representation until they submit thereto, constitutes an unwarranted intrusion of the civil power in a church controversy contrary to the freedom of religion guaranteed by said Constitutions."

Under New York practice, this appeal to the Court of Appeals lies only as of right and is limited to the Constitutional question (New York State Constitution, Article VI, Section 7; New York Civil Practice Act, Section 588, Subdivision 1).

In the Court of Appeals, respondents moved to dismiss the appeal on two grounds: (1) that no constitutional question was involved and (2) that none was raised in the lower courts (R. 581-582). The Court of Appeals did not say that a constitutional question was not involved; nor did it say that it was not raised in the lower courts. That court dismissed the appeal upon the ground that no constitutional question was "properly" raised in the courts below. The full text of the Court of Appeals memorandum is, as follows (R. 591; 301 N. Y. 679 at p. 680):

> "Motions granted and appeal dismissed, with costs and $10 costs of motions, upon the ground that no constitutional question was properly raised in the courts below. (See *Matter of O'Neill* v. *Board of Regents,* 298 N. Y. 777; *Jongebloed* v. *Erie R. R. Co.,* 296 N. Y. 912; *City of New Rochelle* v. *Closter,* 296 N. Y. 506.)"

Whether the question was "properly" raised is a matter for this Court to decide. For, "the question whether a right or privilege, claimed under the Constitution or Laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. *Neal* v. *Delaware,* 103 U. S. 370, 396, 397; *Mitchell* v. *Clark,* 110 633, 645; *Boyd* v. *Nebraska ex rel. Thayer,* 143 U. S. 135, 180." *Carter* v. *Texas,* 177 U. S. 442, at p. 447.

And the applicable rules for determining such a question are set forth in this Court's opinions, as follows: It is not necessary to "refer to the precise words or particular section of the Constitution." *Oxley Stave Co.* v. *Butler County, Mo.,* 166 U. S. 648, at p. 657. "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, at p. 67. Then, "if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient." *Dewey* v. *Des Moines,* 173 U. S. 193, at p. 199. "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Mr. Justice Holmes in *Rogers* v. *Alabama,* 192 U. S. 226, at p. 230.

The cases cited in the memorandum of the Court of Appeals shed no additional light on the reason for the dismissal. All three are short memoranda, without any indi-

cation of the particular circumstances involved. The *O'Neill* case (298 N. Y. 777) and the *New Rochelle* case (296 N. Y. 506) merely state that the appeals are dismissed upon the ground that no constitutional question was properly raised below. The *Jongebloed* case says that (296 N. Y. 912):

> "While no constitutional question was urged at the trial term, it is sufficient for our jurisdictional purposes that, as here, a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision."

The presentation of the question to the state courts was well within the rules laid down by this Court for purposes of a review on certiorari. It was before the trial court and it was before the Appellate Division and the Court of Appeals by chapter and verse.

Reasons for Granting the Writ

The writ should be granted because (1) the case presents an important constitutional question not heretofore decided by this Court and (2) the decision below is in conflict with applicable principles laid down in decisions of this Court.

(1) Important constitutional question not heretofore decided

Anson Phelps Stokes, D.D., LL.D., former secretary of Yale University and former Canon of Washington Cathedral, in his three volume work, Church and State in the United States (Harper, 1950), says that the pending Melish case (Vol. III, p. 402) "will be one of the most important cases in recent years involving Church-State relations." The Churchman, the oldest religious journal in the United

States, recently said editorially (November 15, 1950, at p. 5):

> "The Canon Law of the Protestant Episcopal Church sets a specific and comparatively mild penalty for a congregation that refuses to obey an episcopal judgment dissolving a pastoral relationship, namely, deprivation of representation in the diocesan convention. The reason for the mildness of this penalty lies in the respect which the Episcopal Church traditionally pays to the rights and relative importance of the congregation.
>
> In the 'Melish Case,' a lower court judge, oblivious to the long struggle for democracy in church affairs that underlies our Canon Law, substituted for this mild penalty a drastic civil court injunction enforcing the congregation's compliance with the bishop's judgment upon pain of fine or imprisonment for contempt of court. The judge brushed aside the provisions of our Canon Law and substituted a penalty of his own choosing.
>
> Was not this a clear intrusion of the civil court into the realm of Canon Law in violation of the State and Federal Constitutions, both of which establish absolute separation of church and state?
>
> If this precedent is permitted to stand unchallenged, what of the future?"

The question presented has not heretofore been decided by this Court. Counsel's research has failed to discover that it has heretofore been decided by any court.

Indeed, so plain and palpable an intrusion of the civil power in a religious controversy in the teeth of an exclusive church canon could be understood only as a product of the current political tensions. And yet, this Court has many times said that the integrity of the constitutional guarantees is best exhibited under stress. A noble re-

statement of that principle may be found in the opinion of the United States Court of Appeals for the Ninth Circuit, when it granted Harry Bridges bail (New York Times, August 25, 1950, p. 4, col. 6):

> "that however hard and disagreeable may be the task in times of popular passion and excitement, it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process."

(2) Decision below in conflict with applicable principles laid down by this Court

(a)

"The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'; * * *." *Murdock* v. *Penn.*, 319 U. S. 105, at p. 108; see, also, *Illinois* v. *Board of Education*, 330 U. S. 1; *Prince* v. *Mass.*, 321 U. S. 158; *Cantwell* v. *Conn.*, 310 U. S. 296. "Neither a state nor Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa" for "the First Amendment has erected a wall between Church and State, which must be kept high and impregnable." *Illinois* v. *Board of Education*, 333 U. S. 203, 210-211, 212.

The reach of the constitutional guarantee is not only to protect a state of mind in respect of religion, but also the "free exercise thereof". In *Cantwell* v. *Connecticut*, this Court defined the "double aspect" of the constitutional guarantee as "freedom to believe and freedom to act" (310 U. S. 296, at p. 303):

> "On the one hand, it forestalls compulsion by law of acceptance of any creed or the practice of any

> form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act."

In other words, the governance of a church as well as its creed is within the constitutional guarantee. Thus, in deference to the constitutional separation of church and state, the State of New York disclaims the right to interfere with worship and provides that the "worship of any church" shall be governed "by the authority provided in the laws, regulations, practice, discipline, rules and usages" of the church (Religious Corporations Law, Section 26). Thus, also, the State disclaims any right to interfere in the "calling, settlement, dismissal or removal of a minister" and provides that these shall be governed by the "laws and regulations, practice, discipline, rules and usages" of the church (Id., Section 25). And, finally, the State provides that the temporalities and property of any church shall be administered "in accordance with the discipline, rules and usages" of the church (Id., Section 5).

And the constitutional prohibition against state action applies equally to a decree of a state court taken pursuant to its common law as to action by any other organ of a state. *Shelley* v. *Kraemer*, 334 U. S. 1. For by such decree, a state makes available "the full coercive power of government" (Id., p. 19). In *Shelley* v. *Kraemer*, this Court wrote (334 U. S. at p. 20):

> "We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy."

One of the previous decisions was noted in that opinion, as follows (pp. 17-18):

> "In *Cantwell* v. *Connecticut,* 310 U. S. 296, a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion."

(b)

A review of the "background and environment of the period in which that constitutional language was fashioned and adopted", shows that, among other things, in "efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed". *Everson* v. *Board of Education,* 330 U. S. 1, at p. 9.

From the foregoing, it is apparent that the injunctive provisions of the judgment herein reenact one of the specific evils against which the constitutional guarantee was adopted. The members organized the Protestant Episcopal Church and adopted canons to govern the "free exercise" of their religious beliefs. Among these is one which provides for the sole and exclusive ecclesiastical sanction for refusal and neglect to comply with an ecclesiastical judgment severing the pastoral relation, namely, deprivation of diocesan representation "until they submit thereto". In these circumstances, the civil court had no power to grant an injunction compelling compliance with the Bishop's judgment on pain of fine and imprisonment for contempt. For the constitution forbids state action by a civil court to use the "coercive power of government" (*Shelley* v. *Kraemer,* 334 U. S. at p. 19) to "participate in the affairs of any religious organizations or groups" (*Illinois* v. *Board of Education,* 333 U. S. at p. 211). By the injunction herein

granted, the Court has effected a breach in "the wall between Church and State" erected by the constitution (Id., p. 212).

(c)

Nor may the injunction be justified on the theory that the civil court intervened to protect a property right or, as the trial court put it (R. 499), "to protect the property of the church, for this involved a civil right." Even to the incidental extent that church property was involved, the Court was bound to heed the exclusive ecclesiastical remedy. For, as has been seen, Section 5 of the Religious Corporation Law provides, in deference to the constitutional separation of church and state, that all property of the church corporation shall be administered "in accordance with the discipline, rules and usages" of the church. And the discipline and rule to which this corporation's property was subject provides, it has been seen, that the sole and exclusive remedy at bar was an ecclesiastical remedy, namely, deprivation of Diocesan representation "until they submit thereto".

Neither was anything contrary involved or decided in *Fiske* v. *Beatty,* 120 Misc. Rep. 1, aff'd 206 App. Div. 349, aff'd 238 N. Y. 598, cited by respondents (R. 581). For in the *Fiske* case, the canon involved did not provide an exclusive or any sanction or penalty for failure to comply. In that case, the canon (General Canon 41) provided (fol. 367 of the *Fiske* record):

> "In the event of either party refusing to abide by such judgment, the penalty for such refusal and the further proceedings in the case shall be those provided by the Constitution and Canons of the Diocese or Missionary District in which such Parish is situated."

And the Court there found (fols. 368-369 of the *Fiske* record):

> "No provision has been made by the Constitution or Canons of the Diocese of Central New York upon the subject covered by said General Canon 41 nor any penalty provided for refusal to abide by the judgment authorized by said canon."

It was precisely because in the *Fiske* case the canon did not provide any ecclesiastical remedy that the Court there held that equity should supply one. Overruling a defense that a civil court could not enforce an ecclesiastical decision, the Special Term in that case wrote (120 Misc. Rep. at p. 18):

> "The answer to the first defense is the fact that there is no remedy within the law of the church."

And, finally, that opinion concludes the consideration of this point, as follows (120 Misc. Rep. at p. 20):

> "Not having done so, there is a remedy, and, inasmuch as the church provides no penalty therefor, there must be a resort to civil courts."

On the appeal to the Court of Appeals, the Bishop's brief in that case recognized that the state law disclaims any right to interfere between the parish and its clergy and justified the civil court's jurisdiction solely upon the ground that the church provided no remedy. The Bishop's brief in that case argued:

> "As to the relations of the Parish to its Clergy the State Law expressly and repeatedly disclaims the right to interfere.
>
> Rel. Corp. Law, Sec. 5, last clause; Sec. 25, Sec. 42, last clause and Sec. 43.

The Canons and the Law of the Church therefore control" (p. 68).

"Certainly the law of the church affords no remedy (See Canons General and Diocesan. Dr. White's testimony, pp. 486-489).

* * *

So that unless the remedy granted by the Special Term is sustained plaintiff has no remedy" (pp. 56-57).

In the case at bar, there is, however, an ecclesiastical remedy and an exclusive one "until they submit thereto". The Courts below, therefore, had no power to grant the injunction.

CONCLUSION

In the concurring opinion in *Illinois* v. *Board of Education*, Mr. Justice Frankfurter wrote (333 U. S. at p. 232):

> "If nowhere else, in the relation between Church and State, 'good fences make good neighbors'."

The writ of certiorari should be granted and the part of the judgment sought to be reviewed should be reversed.

Respectfully submitted,

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Office-Supreme Court, U. S.
FILED
JAN 25 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

—against—

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DEWOLFE as Bishop of the Diocese of Long Island,

Respondents.

BRIEF OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondents other than James Pernette De Wolfe.

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Petitioners,

—against—

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Respondents.

BRIEF OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Decisions and Opinions Below

Judgment in favor of respondents was entered (R. 136-140) upon the decision of the Supreme Court of the State of New York, County of Kings (R. 482-499) reported at 194 Misc. 1006.

The Appellate Division unanimously affirmed without opinion in a memorandum (R. 556) reported at 276 App. Div. 1008. Petitioners' motions in the Appellate Division for reargument, or in the alternative, for permission to appeal to the Court of Appeals, were denied in a memorandum reported at 277 App. Div. 783.

Petitioners thereafter appealed to the Court of Appeals without any permission (R. 549-550), presumably on the theory that there was "directly involved the construction of the constitution of the state or of the United States" (New York Civil Practice Act, Section 588, subd. 1(a)). The appeal was dismissed on respondents' motions by a unanimous Court of Appeals (R. 591) in a memorandum reported at 301 N. Y. 679:

> "Motions granted and appeal dismissed, with costs and $10 costs of motions, upon the ground that no constitutional question was properly raised in the courts below. (See *Matter of O'Neill* v. *Board of Regents*, 298 N. Y. 777; *Jongebloed* v. *Erie R. R. Co.*, 296 N. Y. 912; *City of New Rochelle* v. *Closter*, 296 N. Y. 506.)"

Statement as to Jurisdiction

Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals dismissing their attempted appeal (Petition, p. 1). Jurisdiction to issue the writ is invoked under 28 U. S. Code, Section 1257(3) (Petition, p. 13).

Respondents submit that the petition should be denied (1) for want of jurisdiction and (2) for want of a substantial federal question (pp. 6-17, *infra*).

Statement of the Case

Petitioner John Howard Melish was until April 4, 1949 Rector of the Church of the Holy Trinity within the Episcopal Diocese of Long Island of which respondent James Pernette DeWolfe is Bishop. His son, petitioner William Howard Melish, was Assistant Minister of the Church. Respondents other than the Bishop were, at the commencement of this action, nine of eleven members of its Vestry. Petitioners Lewis Reynolds and Anna May Mason are Chairman and Co-Chairman respectively of a so-called "Committee to Retain our Rector".

When the Rector was ordained he took a vow according to the Book of Common Prayer:

> The Bishop: "Will you reverently obey your Bishop, and other Chief Ministers who, according to the Canons of the Church may have the charge and government over you; following with a glad mind and will their godly admonitions and submitting yourself to their godly judgments?"
>
> The Answer: "I will do so, the Lord being my helper." (Ex. 4, R. 150, not printed.)

On March 2, 1949 in proceedings initiated by the Vestry (Ex. 17, R. 155, printed at R. 508) and after hearings before the Standing Committee of the Diocese, at which petitioners appeared personally and by counsel (Ex. H, R. 176, not printed), the Bishop adjudged that the pastoral relations between the Church and the Rector should terminate on April 4, 1949 (Ex. 9, R. 152, printed at R. 44-45).

The Bishop's judgment was rendered in the exercise of jurisdiction conferred by Canon 27 of the Diocese of Long Island making him "ultimate arbiter and judge" in this precise kind of situation (R. 71-73).

The Bishop found, on evidence before the Standing Committee, "dissension in the Parish * * * due to the failure of the Rector to bring about the resignation or removal of the Assistant Minister", whose activities "have been most detrimental to the welfare not only of the Parish but also the Church in the Diocese and nation" (R. 33-34).

The Standing Committee found, and the Bishop approved the finding, that these activities comprised membership in and association with Communistic or pro-Communistic organizations "standing for principles incompatible with the Christian faith" (Ex. 7, R. 34-36). These activities were approved by the Rector (R. 36). By General Canon 45 of the Episcopal Church the Rector had sole and exclusive authority to end the Assistant Minister's tenure (Ex. 2, R. 149, not printed).

The Rector refused to obey the Bishop's judgment. He purported to call a special parish meeting for March 7, 1949 (Ex. 12, R. 153, printed at R. 51-54) at which "charges" were preferred against the nine respondent members of the Vestry who had voted to commence the proceedings before the Bishop (Ex. 12, R. 51-53). On these so-called "charges" they purportedly were removed from office (Ex. N, R. 423, printed at R. 73-83). Thereupon the Rector purported to call for March 14, 1949 another special parish meeting to elect their successors (R. 61).

Thus threatened with imminent, illegal deprivation of office, the nine respondent members of the Vestry commenced this action and were awarded judgment.

The judgment, in so far as appealed from, (1) declares that John Howard Melish ceased to be Rector on April 4, 1949—the date fixed by the Bishop's decision; (2) permanently enjoins petitioners from interfering with execution of the Bishop's judgment; (3) permanently enjoins the Rector from acting as such and from use, as Rector, of

the Church properties; and (4) dismisses petitioners' counterclaims and cross-claims which sought, in material part, (a) dismissal of the complaint and the Bishop's counterclaim; (b) a declaration that the Bishop's judgment is illegal; and (c) a permanent injunction against its enforcement (R. 69-70, 102-103, 133).

Proceedings Below After Judgment

The judgment having been affirmed by the Appellate Division, petitioners applied in that court for permission to appeal to the Court of Appeals. That very application indicated that the petitioners themselves were then unaware of the existence of any constitutional question which would have entitled them to appeal to the Court of Appeals as of right (Civil Practice Act, Section 588, subd. 1(a); compare Section 589).

It was only after the Appellate Division had denied leave to appeal to the Court of Appeals (277 App. Div. 783) that petitioners appealed to the Court of Appeals as of right (R. 449-550).

After the Court of Appeals had dismissed their appeal (301 N. Y. 679), petitioners could have applied to the Court of Appeals within thirty days thereafter for permission to appeal to that court (Civil Practice Act, Section 592, subd. 5(b)(ii)). However they elected to proceed as if the dismissal were a final judgment reviewable in this Court by writ of certiorari but, as we later demonstrate, in the very face of compelling authority to the contrary (pp. 6-7, *infra*).

I.

The order of the Court of Appeals dismissing petitioners' attempted appeal is not a final judgment.

The order of the Court of Appeals dismissing petitioners' attempted appeal is not a "final" judgment within the meaning of 28 U. S. Code, Section 1257(3). It is not a decision on the merits of the constitutional question allegedly raised (Petition, p. 2). It is merely a holding that, as no constitutional question had been properly raised in the lower courts, the appeal taken "as of right" to the Court of Appeals had to be dismissed.

As the order of dismissal is not a judgment "which disposes of the whole case on its merits, it is not final"; "a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case". *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4 (1882). See also:

Western Union Telegraph Company v. *Priester*, 276 U. S. 252, 258 (1928);

Norfolk & Suburban Turnpike Company v. *Commonwealth of Virginia*, 225 U. S. 264, 269 (1912);

Western Union Telegraph Company v. *Crovo*, 220 U. S. 364, 366 (1911).

II.

Petitioners failed to exhaust the appellate remedies provided by state procedure.

Petitioners' failure to apply to the Court of Appeals for leave to appeal to that court, after dismissal of their attempted appeal taken "as of right" (Civil Practice Act, Section 592, subd. 5(b) (ii)), precludes issuance of a writ of certiorari. It is the purpose of the Judiciary Act "that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins,* 122 U. S. 522; *McComb* v. *Commissioners,* 91 U. S. 1, 2; *McMaster* v. *Gould,* 276 U. S. 284; *Southern Electric Co.* v. *Stoddard,* 269 U. S. 186; *Stratton* v. *Stratton,* 239 U. S. 55; *Mullen* v. *Western Union Beef Co.,* 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339." *Gorman* v. *Washington University,* 316 U. S. 98, 100 (1942).

Even were the petition considered as one for a writ to the Appellate Division to review its judgment of affirmance, jurisdiction would not exist to issue the writ. The petitioners nevertheless could have applied to the Court of Appeals for leave to appeal to that court after dismissal of their appeal taken "as of right", and the judgment of the Appellate Division could not become final within the meaning of Judicial Code, Section 1257(3) until such application had been made and denied. See:

Stratton v. *Stratton,* 239 U. S. 55 (1915);
Matthews v. *Huwe,* 269 U. S. 262, 265, 266 (1925);
Andrews v. *The Virginian Railway Company,* 248 U. S. 272 (1918);
American Railway Express Company v. *Levee,* 263 U. S. 19, 20, 21 (1923).

III.

The decision of the Court of Appeals that no constitutional question was properly raised in the courts below is conclusive.

This Court will accept as conclusive the decision of the Court of Appeals that "no constitutional question was properly raised in the courts below". Judicial Code, Section 1257(3) requires that the claim of constitutional right be "especially set up" in the state courts. "This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this Court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White,* 238 U. S. 507; *John, Guardian,* v. *Paullin,* 231 U. S. 583; *Erie R. R. Co.* v. *Purdy,* 185 U. S. 148; *Layton* v. *Missouri,* 187 U. S. 356." *Atlantic Coast Line R. R. Co.* v. *Mims,* 242 U. S. 532, 535 (1916).

No suggestion is or could be made that the holding of the Court of Appeals in this case was framed to evade consideration of the federal right now asserted. See *Hartford Life Insurance Company* v. *Johnson,* 249 U. S. 490, 493 (1919).

IV.

The decision of the Court of Appeals that no constitutional question was properly raised in the courts below is correct.

Even if the decision of the Court of Appeals were not conclusive, its holding that no constitutional question was properly raised in the lower courts is demonstrably correct according to the decisions of this Court and of the Court of Appeals.

Petitioners claim that they "pleaded as a defense the facts which form the basis of the question upon which review is sought" in their answers to the complaint, as follows (Petition, pp. 4-5, R. 101-102):

> "31. Canon 27 of the Diocese of Long Island (See Paragraph 'Twentieth' hereof and Exhibit I) provides the sole remedy for neglect or refusal on the part of the Congregation to comply with a judgment of the Bishop rendered thereunder and that such sole remedy is to deprive the Congregation of a representative to the diocesan convention until they submit.
>
> 32. The Congregation refuses to comply with the purported judgment of the defendant Bishop.
>
> * * * * *
>
> 34. A civil Court, therefore, has no power to grant any other, further or different relief in the premises."

These allegations did not present, or even purport to present, any constitutional question. They were simply a plea that a particular ecclesiastical remedy was exclusive. They were not a plea that the exercise of civil jurisdiction by the trial court would be unconstitutional, nor that the exercise of such jurisdiction would violate any of peti-

tioners' constitutional rights. See *Wilson* v. *Cook,* 327 U. S. 474, 480-481 (1946).

This Court has held that an attack upon a State statute as violative "of the constitution of the United States" is too general to raise a federal constitutional question. *Herndon* v. *Georgia,* 295 U. S. 441, 442, 443 (1935), citing *Maxwell* v. *Newbold,* 18 How. 511, 516 (1855); *Messenger* v. *Mason,* 10 Wall. 507, 509 (1870); *Capital City Dairy Company* v. *Ohio,* 183 U. S. 238, 248 (1902); *Harding* v. *Illinois,* 196 U. S. 78, 85, 86-88 (1904). *A fortiori* the instant pleading which makes no mention of the constitution, is insufficient.

The rule of pleading obtaining in the State of New York and approved by this Court, requires specific reference to the clause of the constitution relied upon in assertion of a constitutional right. *Erie Railroad Company* v. *Purdy,* 185 U. S. 148 (1902), affirming 162 N. Y. 42. There is no such reference here.

The learned opinion of the trial court (R. 482-499, 194 Misc. 1006) contains internal evidence that no constitutional question was presented or passed upon; for although the issues of law and of fact are there considered with meticulous care, the decision is entirely devoid of statement or intimation that constitutional questions were presented or that constitutional rights are involved.

Indeed, the inference is warranted that petitioners not only deliberately refrained from asserting the claim that exercise of jurisdiction by the trial court would infringe their constitutional rights, but they foreclosed themselves from so doing by taking precisely the opposite position. For, in their pleadings they then and there invoked that very jurisdiction by the demand in their counterclaims (R. 70, 103) for judicial declaration that the Bishop's judgment was illegal and for a permanent injunction

against its enforcement. The belated assertion of constitutional right is an obvious afterthought.

Petitioners say that the constitutional privilege of religious freedom was asserted in the brief of petitioners Reynolds and Mason in the Appellate Division. A single sentence is relied upon as asserting the constitutional right. The brief, after repeating the contention made in the trial court that the ecclesiastical remedy of Canon 27 for disobedience of the Bishop's judgment is exclusive, commented that the trial court, in holding that the Bishop's judgment was conclusive, had said that the constitution "has secured religious liberty from the invasion of the civil authority". Petitioners then added—and this is the sentence upon which they rely as raising a constitutional question—"A grosser invasion of religious liberty is difficult to imagine" (Petition pp. 14-15).

Even under the liberal practice prevailing in the State of New York which permits the Court of Appeals to review a constitutional question if properly presented to the Appellate Division and necessarily involved in its decision (*Jongebloed* v. *Erie Railroad Company,* 296 N. Y. 912 (1947)), this fleeting and superficial commentary upon the reasoning of the trial court, contained in an isolated sentence in the brief of the petitioners Mason and Reynolds, but not in the brief of the petitioners Melish, falls far short of meeting the requirement that a constitutional question must be clearly and distinctly presented in the state courts before this Court may review by certiorari. Indeed, this Court has said that a claim of jurisdiction may not be sustained "by reference to briefs and statements which are not part of the record." *Lynch* v. *New York,* 293 U. S. 52, 54 (1934).

Petitioners Melish did not take the position in the Appellate Division that the constitutional privilege of freedom

of religion barred the civil courts from exercising jurisdiction. To the contrary, they argued that there is a remedy provided by the Canons of the Protestant Episcopal Church for a rector's disobedience of his bishop's judgment, *i.e.* an ecclesiastical trial for divestment of his priesthood; and that until this remedy had been exhausted in the instant case there was no right of resort to the civil courts (R. p. 583). It was, of course, the inevitable implication of this argument that *after* the ecclesiastical remedy had been resorted to and the disobedient rector deprived of his priesthood, resort to the civil courts could then be had to restrain him from continuing occupancy of church property. In short, in their brief in the Appellate Division petitioners Melish construed the allegations of their answer filed with the trial court as a claim, not that resort to the civil courts was *unconstitutional,* but only that it was *premature.*

Petitioners Melish are no longer represented by counsel who advanced this argument on their behalf. Their position has changed with their change of lawyers. They now contend that the civil courts do not, and never will, have constitutional power to exercise jurisdiction in the case at bar. Clearly, this was not their contention in the courts below.

No constitutional question having been raised in the State courts, as required by Judicial Code Section 1257(3), this Court is without jurisdiction to issue a writ of certiorari as prayed for in the petition.

V.

The so-called "constitutional question" which petitioners ask this Court to review is unsubstantial and frivolous.

Finally, even were we to assume that the constitutional question which petitioners ask this Court to review was properly presented below (Petition, p. 2), the question is so unsubstantial, and indeed frivolous, as not to merit review by this Court. *Seaboard Air Line Railway Company* v. *Watson,* 287 U. S. 86, 92 (1932); *Deming* v. *Carlisle Packing Company,* 226 U. S. 102 (1912); *Congress of Industrial Organizations* v. *McAdory,* 325 U. S. 472 (1945).

Petitioners have abandoned their contention below that the Bishop's judgment is not in accord with the Canons of the Church and is illegal. They now necessarily concede that the judgment of the Bishop dissolving the pastoral relations is canonically correct and legally conclusive. By the same token, they cannot deny that their refusal to obey the Bishop's judgment is wrongful.

Nevertheless, they contend that the constitutional guaranty of freedom of religion protects the deposed Rector in his continued occupancy of the rectory and in his continued participation, as a member of the Vestry and trustee of the Church, in the management of its temporal and corporate affairs. They must necessarily contend that this same constitutional guaranty precludes the courts, whether at the suit of the Bishop, or the Congregation, or the Vestry, from granting any relief whatever against misuse of church property by one who has become a usurper. Petitioners claim that the only remedies available in this situation are ecclesiastical remedies; that the courts may not intervene, although their intervention is obviously indispensable for the protection of the Church against the misuse of its temporalities and property; that the intervention of the

courts below constitutes a violation of the constitutional guaranty of freedom of religion and the American principle of separation of church and state.

If petitioners are correct in this contention, the courts would be constitutionally powerless to prevent this Rector and a section of his Congregation from transforming this Protestant Episcopal Church into a Roman Catholic Church or a Jewish Synagogue or a Shinto Temple, simply because, so petitioners claim, ecclesiastical remedies are exclusive. A mere statement of this proposition reveals its utter absurdity.

Prior to the enactment by the New York Legislature of the Religious Corporations Law in 1875, "the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions,* 11 N. Y. 243, 263-264; *Petty* v. *Tooker,* 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.,* 36 N. Y. 161.) For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, §5.)" *Saint Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1 (1950).

Petitioners' present contention overlooks completely the fact that the respondent church is not only a religious society but a religious corporation organized and existing by virtue of the Religious Corporations Law of the State of New York. Their contention is also founded upon a completely erroneous misconception of the nature of the judgment entered below. While the judgment does enforce the decree of the Bishop, it does so only incidentally, and

it enforces primarily the provisions of the Religious Corporations Law, particularly Sections 4, 5 and 41.

Section 4 provides that "all the temporalities and property of an unincorporated church, or of any unincorporated religious society, body, association or congregation, shall, on the incorporation thereof, become the temporalities and property of such corporation. * * * " Section 5 requires "trustees of every religious corporation" to administer "all the temporalities and property * * * belonging to the corporation * * * in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject * * * ". Section 41 provides that the duly elected churchwardens and vestrymen of a Protestant Episcopal Church, such as the plaintiff religious corporation, "together with the rector, * * * shall * * * be the trustees of such church * * * ".

The religious society in accordance with the usages and rules of which the property of this religious corporation must be administered, is the Protestant Episcopal Church in the United States of America. "It is contrary to the general canons of that church and the canons of the diocese * * * that the pulpit of an Episcopal church be occupied by a rector not duly elected and instituted, or that its rectory should be possessed by him." *Fiske* v. *Beaty,* 206 App. Div. 349, 358 (1923), affirmed 238 N. Y. 589.

It follows that the courts below, in declaring that petitioner John Howard Melish ceased to be Rector on April 4, 1949 and in enjoining him from thereafter acting as a corporate trustee and occupying or administering the corporate property, simply enforced the foregoing provisions of the Religious Corporations Law of the State, which it is not only their right, but their constitutional duty to do. If, by so doing, they incidentally gave force to the Bishop's judgment, this is only because the discipline, rules and usages of the Protestant Episcopal Church, upon which

the Bishop's judgment is based, have been incorporated into and made a part of the Religious Corporations Law of the State.

Since petitioners do not now contend, and have never contended, that the applicable provisions of the Religious Corporations Law are unconstitutional, their enforcement by the courts below was not and cannot be a deprivation of petitioners' constitutional rights.

All other considerations apart, petitioners' claim that the judgment of the trial court was unconstitutional because the ecclesiastical remedy is "exclusive" is plainly without merit or substance.

Canon 27 of the Diocese of Long Island, in accordance with which the Bishop rendered his judgment, appears at R. 71-73. Petitioner John Howard Melish in his letter to the Bishop (Defendant's Ex. A, R. 532) himself described this Canon as granting "extraordinary and absolute power" to the Bishop.

After providing in substance that if a vestry requests a dissolution of the pastoral relation the Bishop "shall be the ultimate arbiter and judge" in the matter, the Canon goes on to provide (R. 72-73):

> *"Dissolution of the relationship.*
>
> Sec. IV. (1) If the final judgment be a recommendation that the pastoral relation be dissolved and that titles be relinquished by the Clergyman and he shall refuse to comply with the same within 30 days after the decision has been made known to him, the Bishop may declare the canonical dissolution of all connection between the parties.
>
> *Penalty for failure to comply.*
>
> (2) And if the Vestry or Congregation refuse or neglect to comply on their part with such decision or

judgment, the Church or Congregation shall be prohibited from a representation in Diocesan Convention until they submit thereto."

By wrenching the last quoted sentence out of its context, petitioners now make the extraordinary argument that because the Canon provides that a disobedient *congregation* may be punished by denial of representation in the Diocesan Convention, therefore a disobedient *rector* apparently cannot be touched by any civil court. This is a perfect *non-sequitur*. The preceding sentence (Sec. IV (1)) makes it plain that the Bishop can declare the "canonical dissolution" of the pastoral relation; and under well settled principles of law, the Bishop's decision in this regard is not subject to reexamination on the merits by a civil court. *Watson* v. *Jones*, 80 U. S. 679 (1871); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U. S. 1, 16 (1929).

How the ecclesiastical penalty directed by Section IV (2) against the congregation becomes a constitutional bar under the First Amendment to any civil action against an ex-rector who persists in occupying a position from which he has been lawfully removed is beyond our comprehension.

CONCLUSION

The petition should be denied.

Dated: New York, N. Y.
January 24, 1951.

Respectfully submitted,

THEODORE KIENDL,
WILLIAM R. MEAGHER,
Attorneys for Respondents other than James Pernette De Wolfe.

Office-Supreme Court, U. S.
FILED
JAN 22 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

against

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as vestrymen of said Church, and JAMES PERNETTE DE WOLFE as Bishop of the Diocese of Long Island,

Respondents.

BRIEF OF RESPONDENT, JAMES PERNETTE DE WOLFE, AS BISHOP OF THE DIOCESE OF LONG ISLAND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

against

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as vestrymen of said Church, and JAMES PERNETTE DE WOLFE as Bishop of the Diocese of Long Island,

Respondents.

BRIEF OF RESPONDENT, JAMES PERNETTE DE WOLFE, AS BISHOP OF THE DIOCESE OF LONG ISLAND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the Supreme Court of New York, Special Term (R. 482 *et seq*), is reported *sub nom, Rector etc. of Holy Trinity Church* v. *Melish,* 194 Misc. 1006. The memo-

randum decision of the Appellate Division unanimously affirming the judgment below is reported in 276 App. Div. 1008. The memorandum decision of the Appellate Division denying petitioners' motion for reargument or leave to appeal to the Court of Appeals is reported in 277 App. Div. 783.

The Court of Appeals dismissed an appeal taken as of right on alleged constitutional grounds (R. 591) on October 5, 1950, in a memorandum reported in 301 N. Y. (Mem.) 679.

Questions Presented

The questions presented on this application, as distinguished from that sought to be presented in the petition, are:

1. The jurisdiction of this Court to grant certiorari,

2. The existence of any constitutional question which might have been raised in the state court.

Statement of Case

Issue.

Threatened by an attempt on the part of defendant John Howard Melish and his supporters to remove them from office as wardens and vestrymen at a special meeting of the parish, found by the trial court to have been illegally called (R. 492-494), plaintiffs brought this action.

In their complaint they sought judgment:

1. Declaring that

(a) The calling of the meeting for the purpose of removal was illegal and void,

(b) All action taken at it was null and void,

(c) The calling of a further meeting to elect successors to plaintiffs was illegal and void,

(d) Plaintiffs are duly elected and qualified members of the vestry,

(e) Defendant John Howard Melish would legally cease to be rector on April 4, 1949 and after that date will not be legally authorized to exercise the ecclesiastical and temporal rights and duties of that office.

2. Permanently enjoining defendants, other than defendant De Wolfe as Bishop, from

(a) Taking any action to declare vacant or fill by election any of the offices now occupied by plaintiffs,

(b) Interfering with plaintiffs in the proper exercise of their duties,

(c) Interfering with, delaying or preventing due execution and full compliance with the judgment of the Bishop that the pastoral relations between the rector and the church be dissolved on April 4, 1949. (R. 20-22.)

No relief was sought against defendant De Wolfe who was stated to have been joined as a proper party because of his office and because proceedings taken within his jurisdiction were involved in the action. (R. 11.)

In their answers the other defendants pleaded cross claims against defendant De Wolfe, (R. 62-69, 95-101), and sought affirmative relief against him. (R. 70, 103.)

Because of these cross claims, defendant De Wolfe served an answer in which he sought judgment against defendant John Howard Melish:

1. Declaring the pastoral relation between him and the church had ceased and determined on April 4, 1949,

2. Permanently enjoining him from exercising control of the worship and spiritual jurisdiction of the church and from the use and control of the church and parish buildings with the appurtenances and furniture thereof. (R. 114.)

No appeal having been taken from the portion of the judgment which dealt with the plaintiffs as wardens and vestrymen but only from that portion which declared the pastoral relation between John Howard Melish and the church dissolved and restrained him from acting as rector (Pet., p. 1) and no relief other than review of that portion being sought here (id., p. 2), it is apparent that petitioners are seeking to attack the jurisdiction of a court which they themselves invoked by seeking affirmative relief against defendant De Wolfe.

The basis of this attack is that since the canon under which he acted prescribes a penalty for violation *by the vestry* of the Bishop's judgment by deprivation of *lay* representation[1] of the parish in diocesan convention a civil court may not entertain an action to declare the status of defendant John Howard Melish with respect to Holy Trinity Church and protect the property of the church from his unauthorized control.

Parties.

Concededly at the commencement of the action plaintiffs were duly elected wardens and vestrymen of the church since otherwise no attempt to remove them from office would have been made.

It was never stipulated at the trial (Pet., p. 5) that a new vestry would be *validly* elected at a meeting of the parish to be held on April 18, 1949. It was stipulated, in order to avoid a continuance of the trial until the following day (R. 475), that counsel for defendants Reynolds and Mason would produce a witness on the next day, if allowed a continuance, who would testify that at a meeting held that morning of the "vestry" chosen to succeed plain-

[1] The right of John Howard Melish while he remains canonically domiciled in the diocese to a seat and vote in diocesan convention is not affected by dissolution of the pastoral relation with the church. (Constitution of the Diocese of Long Island, § 3, Plffs. Ex. 3.)

tiffs, whom the court later held to have been illegally "removed" (R. 494), a resolution had been adopted calling on the Bishop to annul his judgment. (R. 476.)

Background.

The events leading up to the present action are fully set forth and found in the decision of the trial Justice. (R. 482 *et seq.*)

Canon 27 of the Protestant Episcopal Diocese of Long Island is set forth on page 10 *et seq.* of the petition.[2]

In accordance with Sec. III of the canon the vestry gave notice in writing to the Ecclesiastical Authority, being the Bishop, dated January 21, 1949, of its desire for a separation and dissolution of the pastoral relation between the church and defendant John Howard Melish. (Printed R. 23 *et seq.*, Plffs. Ex. 1, R. 500.)

The urgent reasons for the dissolution were stated to be

1. The rector's age and physical condition,

2. Widespread dissention in the parish due to the failure of the rector to bring about the resignation or removal of the assistant minister whose outside activities had been most detrimental to the parish and had been affirmatively supported, approved and adopted by the rector. (R. 24.)

The Bishop, the matter not having been settled by his godly judgment, in pursuance of the discretion vested in him by the canon to "ask the advice and consent of the Standing Committee"[3] of the diocese referred the matter to it. (R. 26, f. 77.)

The attention of the Court is directed to the fact that reference to the Standing Committee is permissive, not

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[2] The titles in italics are not found in the canons and have been added.

[3] Consisting of four clergymen and four laymen elected by the diocesan convention.

mandatory, under the canon and that in so referring the matter the Bishop surrendered a power vested in him by the canon to proceed forthwith to judgment.

The Standing Committee then held hearings pursuant to notice (R. 502, Plffs. Ex. 6) lasting two days, at which all parties were present and represented by counsel and at which 223 pages of testimony were taken and many exhibits received. (R. 487, Defts. Ex. H and H1.)

The Standing Committee made its report to the Bishop, dated February 24, 1949. (Printed R. 26 *et seq.*, Plffs. Ex. 7, R. 503.)

In it the Standing Committee found the rector to be seventy four years old and that no evidence had been produced of impairment of health and on the contrary a letter from his physician stating he was in normal health had been submitted. (R. 29.)

It then found that Communism is incompatible with the Christian faith (R. 30-31) and, after reviewing the acts of the assistant minister (R. 34-36), which the rector had stated he approved (R. 36) and which were undenied by either the assistant or the rector either before the Standing Committee or at the trial, it was stated (R. 36):

> "Association so general with agencies standing for principles incompatible with the Christian faith calls for explanation on the part of a priest. Neither the Rector nor Assistant Minister saw fit to take advantage of his opportunity to deny or explain. Their failure constitutes an admission of conduct which could not fail to disrupt a parish and adversely affect the Church.
>
> It appears from the statement of the Rector at the time of the Bishop's visitation and his failure to deny the statements of the Vestry at our hearing that he has affirmatively supported, approved and adopted the activities of the Assistant Minister who under Canon 45 of the General Canons is under his authority. In fact in his communication to the Bishop and Standing Committee, dated February 15,

> 1946, he states 'I admit that the activities of my son, in so far as known to me, have been approved and supported by me.' "

The Standing Committee then unanimously adopted a resolution recommending dissolution. (R. 42-43.)

On March 2, 1949 the Bishop rendered his judgment (Printed R. 44-45, Plffs. Ex. 9, R. 503) providing:

1. That the pastoral relation between John Howard Melish and the church should cease and determine on April 4, 1949,

2. That the vestry should execute and deliver an agreement obligating it to pay John Howard Melish annually a sum equal to the amount received by him from the Church Pension Fund.

At the same time the Bishop handed down a memorandum stating the reasons for his action. (R. 46-50.)

Thirty days having elapsed, during which the rector refused to comply with the judgment by relinquishing his titles, the Bishop, in pursuance of the canon, issued his declaration of the canonical dissolution of all connection between the church and John Howard Melish on April 4, 1949. (Plffs. Ex. 16, R. 507-508.)

Statement as to Jurisdiction

Jurisdiction is invoked under Section 1257(3) of the U. S. Code.

Such jurisdiction therefore depends upon a showing by petitioners that

> (a) the validity of a State statute has been drawn in question on the ground of its being repugnant to the Constitution of the United States or
>
> (b) a title, right, privilege or immunity has been specially set up or claimed under the Constitution of the United States.

The petition fails to satisfy either requirement.

Argument

(a)

No state statute has been drawn in question on the ground that it is repugnant to the Constitution. On the contrary petitioners rely upon the Religious Corporations Law. (Pet., pp. 14, 21.)

The alleged constitutional question is stated as follows:

> "Whether the part of the judgment sought to be reviewed, by coercing execution and compliance with the ecclesiastical judgment of the Bishop on pain of contempt of court—in the teeth of an exclusive and different ecclesiastical remedy, namely deprivation of diocesan representation until they submit thereto —constitutes unwarranted intrusion of the civil power of the state in a religious controversy in violation of the constitutional separation of church and state guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment thereof." (Pet., p. 2.)

In presenting this question petitioners concede the judgment of the Bishop is canonically valid and admit their refusal to obey it (Pet., p. 10) is wrongful. Nonetheless they assert the right to make the First Amendment a weapon with which to protect the former rector in his occupancy and control of the parish property and control of its worship contrary to the law of the Church.

In *Watson* v. *Jones,* 80 U. S. 679, this Court divides ecclesiastical bodies into two classes:

> 1. a religious congregation which by the nature of its organisation is strictly independent of other ecclesiastical associations and so far as church government is concerned owes no fealty or obligation to any higher authority;
>
> 2. a religious congregation which is a subordinate member of some general church organisation in which there are superior tribunals with a general and ultimate power of control. (p. 722.)

Of the second class, in which the Court expressly included the Protestant Episcopal Church, the Court said:

> "* * * All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." (p. 729.)

The rule in the *Watson* case was reaffirmed in *Shepard* v. *Buckley,* 247 U. S. 1, 2, affirming the decision of the Circuit Court of Appeals, 222 Fed. 669, and is the basis of the law of New York as stated in *Connitt et al.* v. *R. P. D. C. of N. Prospect,* 54 N. Y. 551, 561, and *Baxter* v. *McDonnell,* 155 N. Y. 83, 101.

The Court will mark that no question is presented of interpretation and effect of the canons, the regularity of the procedure followed by the ecclesiastical authorities, the power of the Bishop to dissolve the pastoral relation or the effect ecclesiastically under the canon law of the Bishop's judgment.

John Howard Melish ceased to be rector of Holy Trinity Church on April 4, 1949 and would not be restored as rector by a reversal of the judgment of the Supreme Court of the state.

Construing Canon 27, Sec. IV, (2), of the diocesan canons (Pet., p. 12) petitioners argue that since no ecclesiastical penalty for violation *by the priest* of the Bishop's judgment is expressly provided in the canon it cannot be made the basis of enforcement of any right in a civil court.

Parenthetically it is important to find that at the Appellate Division a different argument was based upon this alleged absence of an express ecclesiastical penalty. There it was argued that noncompliance by a priest constituted an ecclesiastical offence triable by a church court and that until defendants Melish had been presented on charges before such a court the present action was premature. (Melish Brief, App. Div., p. 9, *et seq.*; Reynolds Brief, App. Div., p. 30 *et seq.*)

Prematurity having failed them, petitioners turn to unconstitutionality, often the refuge of those who resist lawful authority.

The cases cited in the petition establish the rule that only where the *primary* statute, ordinance or common law of the civil authority *as applied in a given case* would result in deprivation of religious liberty will the courts decline to enforce it.

In *Murdock* v. *Pennsylvania,* 319 U. S., 105, a municipal ordinance as construed and applied required religious corporations to pay a license tax as a condition to the pursuit of what was found on the facts to be "an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." (p. 110.)

The Court, however, was careful to say:

> 'Jehovah's Witnesses are not "above the law". But the present ordinance is not directed to the problems with which the police power of the state is free to deal.' (p. 116.)

In *Everson* v. *Board of Education*[4], 330 U. S. 1, a district board, acting under a statute authorising it to make rules and contracts for transportation of children to and from schools other than private schools, had authorised reimbursement of parents for fares paid for transportation by

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[4] Cited as *Illinois* v. *Board of Education.* (Pet., p. 20.)

a public carrier of children attending Roman Catholic schools.

Again it was the application of the statute to the particular facts which was reviewed.

In *Prince* v. *Massachusetts,* 321 U. S., 158, a statute forbade the sale or offer for sale of newspapers, magazines or other articles on public streets by minors. Its application to a twelve year old Jehovah's Witness who claimed to be a minister was upheld.

In *Cantwell* v. *Connecticut,* 310 U. S., 296, the application to an adult of a statute which forbade solicitation of money for a religious cause without a certificate from an officer, who was required to determine if the cause was religious and might withhold the certificate if he determined it was not, was held to be an unconstitutional restraint.

It was also held that playing a phonograph attacking the Roman Catholic Church in a neighborhood inhabited largely by its members was not an act tending toward a breach of the peace and that conviction of the common law offence violated the constitutional guarantee of religious freedom.

In *McCollom* v. *Board of Education*[5], 333 U. S., 203, the released school time case, the Court said:

> "The foregoing facts, without reference to others that appear in the record, show the use of tax supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education." (p. 209.)

In *Shelley* v. *Kraemer,* 334 U. S. 1, where enforcement of covenants against the sale of land to negroes was denied, the previous decisions to which the Court refers in the portion of the opinion quoted by petitioners are *American*

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[5] Cited as *Illinois* v. *Board of Education.* (Pet. Brief, p. 20.)

Fed. of Labor v. *Swing*, 312 U. S., 321, involving enforcement of a common law policy in restraint of peaceful picketing; *Cantwell* v. *Connecticut, supra; Bridges* v. *California*, 314 U. S., 252, enforcement of a common law rule relating to contempt by publication and *Chicago, Burlington &c. Rd.* v. *Chicago*, 166 U. S. 226, in which a judgment for nominal damages in condemnation was upheld where the case had been properly submitted to the jury.

The fact that the decision of the Court has differed according to the facts of the particular case makes the test clear.

The test is whether the application of a primary statute, ordinance or rule of common law of the civil authority to particular facts constitutes a violation of the limitations placed upon the state by constitutional guarantees of religious freedom.

New York has not interfered with worship in the present action as contended by petitioners.[6] (Pet., p. 21). It has not attempted "compulsion by law of acceptance of any creed or the practice of any form of religion". It has not attempted to restrict freedom of conscience or "freedom to adhere to such religious organisation or form of worship as the individual may choose".

On the contrary it has safeguarded the "free exercise of the chosen form of religion", namely the Protestant Episcopal Church in the Diocese of Long Island. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

In the present action the only primary statute of the state the application of which can be said to be involved is the Religious Corporations Law. (L. 1909, ch. 53, as amended.)

Section 5 of that statute requires the "trustees of every religious corporation" to administer "all the temporalities

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[6] John Howard Melish is quite free to officiate in Holy Trinity as a priest of the Church.

and property real and personal, belonging to the corporation and the revenues therefrom * * * in accordance with the discipline, rules and usages of the corporation and the ecclesiastical governing body, if any, to which the corporation is subject".

Judge Conway, in an opinion in which three judges concurred making a majority of the Court of Appeals, has recently said:

> "The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y., 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 161.) For the public good, the Legislature decreed that the trustees of religious corporations, *irrespective of the wishes of a majority of the local congregation*, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, § 5.)" (Emphasis supplied.)

St. Nicholas Cathedral v. *Kedroff*, decided Nov. 30, 1950, Law Report News Dec. 5, 1950, p. 5, 8, not yet reported.

Clearly if the trustees, of whom John Howard Melish was one until his relation was dissolved (Relig. Corp. Law, § 41), had sought openly to divert the property to the Congregational faith, which in effect is what was attempted, they could unquestionably have been enjoined at the suit of a single parishioner.

The evils against which the constitutional guarantees sought to be invoked were intended are very different from the application to a particular state of facts of the law of the Church itself as determined by its judicatories.

When rights of property are dependent upon questions of doctrine, discipline or church government the civil courts have never hesitated to enforce the decision of an ecclesiastical tribunal.

> *Watson* v. *Jones,* 80 U. S. 679;
> *Connitt et al* v. *RPDC of N Prospect,* 54 N. Y. 551;
> *Rector St. James Church* v. *Huntington,* 82 Hun 125, 133;
> *Fiske* v. *Beatty,* 120 Misc., 1; modified 206 App. Div. 349; affd., 238 N. Y. 598;
> *Rhinelander* v. *Ballentine,* 23 Penn. Dist. Rep., 1003;
> *Church and State in the United States,* quoted at page 18 of petitioner's brief, Vol. III, p. 369 *et seq.*

In *Gonzales* v. *Archbishop,* 280 U. S. 1, a very similar objection was raised to the jurisdiction of the civil court. This Court said:

> "*First.* The Archbishop interposes here, as he did below, an objection to the jurisdiction of the Philippine courts. He insists that, since the chaplaincy is confessedly a collative one, its property became spiritual property of a perpetual character subject to the jurisdiction of the ecclesiastical forum; and that thereby every controversy concerning either the right to appointment or the right to income was removed from the jurisdiction of secular courts. The objection is not sound. The courts have jurisdiction of the parties. For the Archbishop is a juristic person amenable to the Philippine courts for the enforcement of any legal right; and the petitioner asserts such a right. There is jurisdiction of the subject matter. For the petitioner's claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.

> The fact that the property of the chaplaincy was transferred to the spiritual properties of the Archbishopric affects not the jurisdiction of the courts, but the terms of the trust. *Watson* v. *Jones,* 13 Wall. 679, 714, 729."

If the state should undertake to exercise primary jurisdiction in ecclesiastical matters the exact situation existing today in the relationship between His Majesty's Government in the United Kingdom and the Church of England would be presented, a situation leading many members of that branch of the Anglican communion to favor disestablishment.

The Archbishop of York has recently written a book[7] which shows the effect of establishment. In it his Grace does not protest against the enforcement of the judgments of church tribunals by civil courts as found in the American authorities we have cited but against the trial of questions involving doctrine, discipline and worship in the civil courts as a matter of original jurisdiction.

It is such original jurisdiction against which our constitutional limitations apply. It is primarily the Erastinian doctrine legislated into the Act for the Submission of the Clergy in 1554 (25 Hen. VIII, c. 19) that was forbidden.

This is a far cry from a declaratory judgment and injunctive relief for the protection of property rights based upon the judgment of a Bishop who is made "ultimate arbiter and judge" by the canon admittedly governing the question presented to him in the present case.

The right of a bishop of the Protestant Episcopal Church to invoke the aid of a court of equity has been expressly upheld and is the law of the state.

> *Fiske* v. *Beatty,* 206 App. Div. 357, 360; affd. 238 N. Y. 598.

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[7] Church and State in England by Cyril Garbett, Archbishop of York, London 1950, Hodder & Stoughton.

An ecclesiastical penalty against the vestry is necessary because in the *Fiske* case the Appellate Division, modifying the judgment below held that, while he may restrain the recalcitrant priest, a bishop may not restrain a contumacious vestry whose authority to act may only be tried in *quo warranto.*

Assuming *arguendo* that petitioners were correct in their interpretation of the canon law and that there is no *ecclesiastical remedy* against a contumacious priest who defies the judgment of his Bishop, there is still no question whatever of constitutional guarantees in this case where a defiant priest (473) refuses to relinquish control of the worship and the spiritual jurisdiction of a parish and the use of the church and parish buildings and 'admits that he intends to continue as Rector of the Parish', (132), in violation of the canon law.

If this were possible the whole government of every centrally organised church would be destroyed and its temporalities and property, instead of being administered in accordance with the discipline, rules and uses of the ecclesiastical governing body to which the Church is subject (Religious Corp. Law, sec. 5), would be administered according to the vagaries of the individual congregation.

This is exactly what these petitioners have sought to accomplish, namely, to place a parish of the Protestant Episcopal Church in the class described in *Watson* v. *Jones, supra,* as a religious congregation which is strictly independent of other ecclesiastical association and as far as church government is concerned owes no fealty or obligation to any higher authority.

As stated by the Appellate Division in *Fiske* v. *Beatty,* 206 App. 349, 356:

> '* * * The true doctrine of the Protestant Episcopal Church in America, in relation to the sources of power of a priest or rector, as we understand it, is correctly expressed as follows: "In the Church,

> power does not *ascend* from the congregation or the vestry to the rector; it *descends* from above to the Bishop and through the Bishop to the subordinate ministry." (White's Church Law [ed. 1898], 185.)' (Emphasis in original.)

To find in this case the constitutional question presented in the petition would submit this and all other centrally organised churches to a change in the form of their own peculiar church government by judicial decree and thereby adopt the very Erastinian doctrine against which the First Amendment protects.

Religious freedom does not mean religious license. Each member of the Protestant Episcopal Church is free to bring before General Convention or the convention of his diocese any amendment of the canon law. Until the canons are amended he must obey them. (*Watson* v. *Jones, supra.*)

Indeed these petitioners were instrumental in bringing before the General Convention of 1949 amendments to Canon 46 of General Convention which, in the absence of a diocesan canon, deals with the subject of dissolution of the pastoral relation. (Plffs. Ex. 2.)

It was rejected in both Houses[8] as stated in the extract from *Church and State in the United States,* quoted at page 27, *infra.*

The judgment in this action is dated April 25, 1949. (R. 136.) The General Convention was held from September 26 to October 7, 1949 so that the supreme governing body of the Church refused to amend the canon law upon this subject after interpretation by the Bishop and Standing Committee and the judgment herein.

The fact that no ecclesiastical penalty against a contumacious clergyman is expressly stated in canon 27 cannot

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[8] Journal of the General Convention of the Protestant Episcopal Church in the United States of America, printed for the Convention, 1949, pp. 197-200.

make the application of Section 5 of the Religious Corporations Law to the facts found in the present suit unconstitutional.

Enforcement under that section of a judgment of the church judicatories does not fall within the constitutional limitations defined by this Court in *Everson* v. *Board of Education,* 330 U. S. 1 at pages 15-16 or in *McCullom* v. *Board of Education,* 333 U. S. 203, at pages 209-212.

No church is set up. No law has been enforced aiding or preferring one religion over another. No force or influence has been used against any person to compel him to go to or remain away from church against his will or to profess a belief or disbelief in any religion. No one has been punished for belief or disbelief or church attendance or absence from church. No tax has been levied to support religious activities. Nor has the State sought to "participate in the affairs of any religious organisations or groups". (Pet., p. 22.)

The absence of an ecclesiastical penalty against the clergyman in fact brings this case squarely within *Watson* v. *Jones, supra,* where the opinion of the Court begins with these words:

> "This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or *found itself unable to protect.* Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; *the courts when so called on must perform their functions as in other cases.*" (80 U. S. at pages 713-714, emphasis supplied.)

Later with respect to centrally organised religious bodies as defined in the opinion at page 722 the Court said:

> "In this class of cases we think the rule of action which should govern the civil courts, *founded in a broad and sound view of the relations of church and state under our system of laws,* and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried,[9] the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." (p. 727, emphasis supplied.)

(b)

No title, right, privilege or immunity was specially set up or claimed under the Constitution of the United States in the state court.

For the basis of the claim of jurisdiction we turn to the petition.

It is first asserted that "in their answers all petitioners pleaded as a defense the facts which form the basis of the question upon which review is sought. (R. 68-69, 101-102.)" (Pet., p. 4.)

The answer of defendants Melish pleaded the following "as a partial defense" (R. 68-69):

> "Thirty-First: Canon 27 of the Diocese of Long Island (See paragraph 'Twentieth' hereof as Exhibit 'I') provides the sole remedy for neglect or refusal on the part of the congregation to comply with a judgment of the Bishop rendered thereunder, and such sole remedy is to deprive the congregation of a representative to the Diocesan Convention until they submit thereto.

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[9] Canon 27 makes the Bishop "the ultimate arbiter and judge". (Pet., p. 11.)

Thirty-Second: On information and belief, the congregation refuses to comply with the purported judgment of the defendant Bishop.

Thirty-Third: Canon 27 of the Canons of the Diocese of Long Island provides that it shall be the duty of a Rector to submit to and abide by the judgment of the Bishop rendered thereunder. Canon 53 of the Canons for the Government of the Protestant Episcopal Church in America provides the sole remedy for violation by a Rector of the Canons of the Diocese to which he belongs, namely, trial and presentment before the Ecclesiastical Court for the Diocese.

Thirty-Fourth: A civil court, therefore, has no power to grant any other, further or different relief in the premises."

This was a conclusory statement, the only fact being the canon itself which was placed in evidence by plaintiffs (Plffs. Ex. 3) and is printed at pages 71-73 of the record.

No constitutional question arising out of the provisions of the canon was presented to the trial court.

At the close of the plaintiffs' case counsel for defendants other than De Wolfe moved to dismiss as follows (R. 156):

"Mr. Weissman: I have some motions, Mr. Smith.

The Court: Very well. We will hear your motions.

Mr. Weissman: I move to dismiss the complaint, on the ground that the plaintiffs have not adduced evidence sufficient to constitute the cause of action pleaded in the complaint, and specifically that portion of the complaint which alleges that there was no hearing on March 7, 1949, which was the basis of the removal procedure of the nine vestrymen. There is no evidence offered in support of that, and I now move to dismiss that portion of the complaint.

Mr. Smith: I think that point is well taken, and I join in the motion.

The Court: Denied.

Mr. Weissman: Exception."

At the close of the trial the parties moved for judgment without any statement of grounds therefor. (R. 479-480.)

No express reference to the Constitution can be found either in the pleadings (R. 9-133) or case and exceptions. (R. 141-481.)

Upon the appeal to the Appellate Division, counsel for appellants John Howard Melish and William Howard Melish stated the questions raised by their appeal, as follows:

> "The Question Raised by This Appeal.
>
> The questions raised by this appeal are:
>
> Should a Civil Court intervene in an ecclesiastical dispute to enforce a Bishop's purported judgment when the remedies provided in the discipline of the Church have not been exhausted?
>
> Has a Bishop of the Protestant Episcopal Church the power, without action by an Ecclesiastical Court, to decree a separation of the pastoral relation between a Rector and his Parish against the expressed wishes of the Rector and the Congregation?
>
> Should a Civil Court enforce a Bishop's judgment which is arbitrary and not supported by the evidence before him?" (Melish brief, p. 2.)

The oral argument of counsel was confined to the following statement in his brief:

> "ARGUMENT
>
> These appellants will argue:
>
> I. Since the remedies provided in the discipline of the Protestant Episcopal Church had not been exhausted, the Court below erred in its intervention to enforce the Bishop's purported judgment.
>
> II. The Bishop had no jurisdiction to decree a separation of the pastoral relations where neither the Rector nor the Congregation desired such a separation.
>
> A. The Vestry is the agent of the Congregation and can petition the Bishop only as such.

B. The Chancellor misconstrued the law and misrepresented the function of a Vestry misleading the Bishop and the Standing Committee.

III. The recommendation of the Standing Committee and the judgment of the Bishop were arbitrary and unreasonable in that there was no sufficient evidence to sustain the charges." (Melish brief, pp. 8, 9.)

Counsel in his brief stated his conclusion, as follows:

"CONCLUSION

"The powers of a Bishop of the Protestant Episcopal Church are much more circumscribed than those of a Bishop of some other denominations. In the Protestant Episcopal Church, if the Rector and his Congregation do not seek a separation, only through action by the Ecclesiastical Court may a Rector be deposed or disciplined. Without such action, the Bishop of the Diocese is powerless to interfere. He may offer advice and counsel, but he may take no steps to punish except to arrange a presentment before the Ecclesiastical Court. If this Bishop wished to act, that was his remedy—a remedy which he eschewed perhaps because he knew that the Rectors had done no acts and were guilty of no conduct punishable under the rules of the Church. If such be the case, the Rectors are entitled to exoneration by the judicial body of the Church; conversely, if they have offended the Church's rules, it is that body, and not the Civil Courts, which should rebuke them.

The judgment in favor of the plaintiffs and the Bishop declaring that the pastoral relation had ceased and enjoining the defendant Rector from exercising control of the worship of the Church and from using its buildings or appurtenances should be reversed, with costs, and judgment granted for these defendants *enjoining the individual plaintiffs and the Bishop from taking any steps to enforce the Bishop's judgment except by appropriate action within the discipline of the Church.*" (Melish brief, pp. 25, 26, emphasis supplied.)

Neither in his brief nor in his oral judgment was any reference made to the Constitution of the United States of America.

On the contrary they sought enforcement of the law of the Church, as they interpreted it, by the civil court.

At the Appellate Division the brief of counsel for appellants Reynolds and Mason contained the following points:

"SUMMARY OF POINTS

I. The Bishop's arbitral judgment is a nullity, because the submission of the differences to him by the petition of the former Vestry was expressly disapproved by over 70% of the Congregation, for whom that Vestry acted as agents and legal representatives.

II. The judgment of the Court below was unauthorized, because the Canons themselves provide the exclusive ecclesiastical remedy for their enforcement, namely, deprivation of Diocesan representation until the parties submit.

III. The statutory provision that a special meeting may be held on any secular date fixed by the Vestry does not apply to the special meeting in issue here, for this one was called pursuant to the inherent power of the Congregation to summarily remove its agents and representatives for recreancy and it was shown that the Vestrymen would not have fixed the date, even if requested." (Reynolds brief, p. 22.)

Neither in his brief nor in his oral argument was any reference made to the Constitution of the United States of America. Like the Melishes they sought the judgment of the court.

A claim of jurisdiction, moreover, cannot be sustained by reference to briefs and statements which are not part of the record.

Lynch v. *New York*, 293 U. S. 52.

Where facts from which a federal question might arise are argued in the state court but their alleged federal character as here was not indicated they cannot be made the basis of an application for a writ of certiorari.

> *Chicago Indianapolis &c. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131.

A mere claim in a pleading never afterwards brought to the attention of the state court is insufficient where there is no evidence in the record that the decision of the court was invoked upon a right under the Constitution.

> *Hulbert* v. *Chicago,* 202 U. S. 275, 280.

This Court declines jurisdiction where the record does not present a constitutional question substantial in character and properly raised below.

> *Corrigan* v. *Buckley,* 271 U. S. 323, 329 and cases cited.

In *Oxley Stave Company* v. *Butler County,* 166 U. S. 648, cited by petitioners, the Court referring to the words "specially set up or claimed" said at page 654:

> 'This question must receive a negative answer, if due effect be given to the words "specially set up or claimed" in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so de-

clare; and unless he does so declare "specially", that is, unmistakably, this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown* v. *Keene,* 8 Pet. 112, 115; *Robertson* v. *Cease,* 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.'

Petitioners' quotation from *Dewey* v. *Des Moines,* 173 U. S. 193, is incomplete. The statement of the Court at page 199 was:

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour,* 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad* v. *Chicago,* 166 U. S. 226, 231; *Green Bay &c. Company* v. *Patten Paper Company;* and *Bank of Lincoln* v. *Bank of Cadiz, supra.*"

On the same page the Court said:

> "* * * It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature."

In the portion of the decision of the trial court from which petitioners quote at page 13 of their brief the court was citing and applying the rule in *Watson* v. *Jones, supra.* However the fact that federal questions are discussed in an opinion gives no right of review where no claim under the Constitution was presented.

Howard v. *Fleming,* 191 U. S. 126, 137.

The claim of title, right, privilege or immunity must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, (*Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308) and upon the question whether or not such a claim has been asserted the decision of the state court is binding upon this Court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.

Atlantic Coast Line RR Co. v. *Mims,* 242 U. S. 532.

Here the Court of Appeals has done nothing more than decline to pass upon the constitutional question because not raised in the court below as required by the state practice. (R. 591.)

Missouri-Pacific Ry. Co. v. *Taber,* 244 U. S. 200;
Hartford Life Ins. Co. v. *Johnson,* 249 U. S. 490, 493;
Postal Telegraph Cable Co. v. *White,* 296 U. S. 534;
Penn R. Co. v. *Ills. Brick Co.,* 297 U. S. 447, 463;
Louisville & Nashville RR Co. v. *Woodford,* 234 U. S. 46, 51;
Layton v. *Missouri,* 187 U. S. 356, 361.

Dr. Anson Phelps Stokes is quoted at page 18 of petitioners' brief as stating that this case "will be one of the most important cases in recent years involving Church-State relations."

The portion of Dr. Stokes's recent book "Church and State in the United States," (New York 1950, Harper & Brothers), Vol. III, pp. 395-403, upon which petitioners rely is a brief for the Melishes. Yet he states the rule in *Watson* v. *Jones, supra,* where, after quoting from the Canons of General Convention, he says:

> "It is only the interpretation and enforcement of these and similar provisions in cases of dispute in matters of property and clergy rights, which cannot be settled by ecclesiastical authority, that are the function of civil courts in dealing with the Church. * * *." (p. 401.)

The reverend author ends his comment on the matter as follows:

> "It appears to an outsider reading both sides of the controversy that in principle the stand of the Melishes is the one most in keeping with the general American tradition of freedom, but that the specific wording of the canons of the Episcopal Church and of the Diocese of Long Island may support the old vestry and the lower court; and that if the Episcopal Church wants to insure greater protection for its clergy and its congregations, when their views differ from those of diocesan authority, the canons may need to be modified. *But the General Convention of the Church in San Francisco in 1949, decided not to take the action urged by supporters of the Melishes to add to the canons provision for review by higher diocesan courts of diocesan action in such cases.*" (pp. 402-403, emphasis supplied.)

The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids.

Osborn v. *Ozlin,* 310 U. S. 53, 62;
Hoopeston Canning Co. v. *Cullen,* 318 U. S. 313;
State Farm Ins. Co. v. *Duel,* 324 U. S. 154, 157.

Moreover the decision in the present case has no binding effect upon the Church outside the diocese of Long Island. Canon 46 of General Convention which deals with the subject of the dissolution of the pastoral relation contains the following provision:

> "Sec. 4. This Canon shall not apply in any Diocese or Missionary District which has made, or shall hereafter make, provision by Canon upon this subject, nor in contravention of any right of any Rector, Minister, Parish, Congregation, or Vestry under the law of the Civil Authority." (Plffs. Ex. 2.)

It will thus be seen that each diocese is completely free to adopt any canon on the subject it pleases. General Convention has rejected any amendment and no action such as "the supporters of the Melishes" urged at San Francisco in 1949 has to our knowledge been taken by any diocese.

Procedure

(a)

Petitioners seek a writ directed to the Court of Appeals. (Pet., p. 1.) The writ should be denied on the additional ground that it is not directed to the proper court. Section 1257 provides for review of "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Where the court of last resort in a state has refused to take jurisdiction of the case by appeal or writ of error, its action is not a final judgment or decree.

> *Adam* v. *Saenger*, 303 U. S. 59, 61;
> *Western Union* v. *Priester*, 276 U. S. 252, 258;
> *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20.

This Court, in *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269, stated the rule to be:

> "* * * where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort

> of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case,* and shall therefore, by not departing from the face of the record, resolve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

A writ can only be directed to the Court of Appeals if by its order dismissing the appeal it assumed jurisdiction to pass upon the merits of the controversy. In its decision the court specifically gave as a reason for granting the motion to dismiss the absence from the case of any constitutional question properly raised. (R. 591.) Such action by it was not an assumption of jurisdiction and a decision on the merits. It was a decision that it had no jurisdiction.

> *Cuyahoga Power Co.* v. *North'n Realty Co.,* 244 U. S. 300.

There the complaint of the plaintiff in error was dismissed at trial term. The case was then appealed to the Ohio Court of Appeals and there affirmed. Plaintiff in error then applied to the Supreme Court of the State to direct the Court of Appeals to certify the record for review and on the denial of such application prosecuted a writ of error to the Court of Appeals from the Supreme Court. This writ was dismissed by the Supreme Court for want of jurisdiction on the stated ground that the case did not "involve any question arising under the Constitution of the United States or the State of Ohio." Under the Ohio statutes, as under the statutes of New York, a writ of review by the court of last resort exists if a question under

the Constitution of the United States or of the State Constitution is presented in the case.

A writ of error was obtained which was directed to the Court of Appeals of the State of Ohio. The jurisdiction to review of this Court was then challenged by motion to dismiss. One of the grounds was that the writ should have been directed to the Supreme Court of Ohio and not to the intermediate Court. The motion was denied, the Court saying:

> "1. It is contended that as under § 237 of the Judicial Code we have jurisdiction to review only final judgments of the highest court of the State in which a decision could be had, the writ of error should have been prosecuted to the Supreme Court of Ohio. In view, however, of the denial by that court of the application to direct the Court of Appeals to certify the record for review, and its order dismissing the writ of error for want of jurisdiction, the contention is without merit." (pp. 302-303.)

The petitioners here are in the same dilemma, with a transposition of the courts to which the writ is sought, as the petitioner in *Matthews* v. *Huwe,* 269 U. S. 262. A writ will not lie to the Court of Appeals since it did not assume jurisdiction and therefore the Supreme Court becomes the highest court in which a decision could be had. However, a writ will not lie to the Appellate Division of the Supreme Court because under the New York State Constitution, Article 6, Section 7, subdivision 5, and Civil Practice Act Sections 588, 589, after dismissal of an appeal as of right to the Court of Appeals, appellants are given the right to apply to the Court of Appeals for permission to be heard on the merits in the interest of substantial justice. No such application was made by these petitioners and by reason of failure so to apply they have not exhausted their remedies in the State court and any writ directed to the Appellate Division would likewise be dismissed.

Matthews v. *Huwe, supra,* p. 265;
Stratton v. *Stratton,* 239 U. S. 55.

(b)

In view of the provisions of Sections 588 and 589 of the Civil Practice Act of the state, the present judgment does not possess the finality necessary to vest this Court with jurisdiction under Section 1257 of the United States Code.

After dismissal of their appeal as of right to the Court of Appeals it was possible for these petitioners to apply to that court for permission to appeal. (CPA §§ 588, 589.)

A judgment must be final in two senses. It must be subject to no further review or correction in any other state tribunal and must also be the final word of a final court.

Market Street R. Co. v. *Comm'n.*, 324 U. S. 548, 551.

The present case falls within the rule stated in *Matthews* v. *Huwe*, 269 U. S. 262, 265, where the Court said:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JACKSON A. DYKMAN,
Of counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JAN 25 1951
CHARLES ELMORE CROPLEY
CLERK

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

—against—

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DEWOLFE as Bishop of the Diocese of Long Island,

Respondents.

OBJECTIONS OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) TO MOTION ON BEHALF OF SOME 2576 MEMBERS OF THE CLERGY OF VARIOUS RELIGIOUS DENOMINATIONS OF PROTESTANT CHURCHES IN THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

THEODORE KIENDL
WILLIAM R. MEAGHER
Attorneys for respondents other than James Pernette De Wolfe

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